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MN OSH DIVISION DOCKET NO. 10137 & 10138

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

Ken B. Peterson, Commissioner,
Department of Labor and Industry,
State of Minnesota,
Complainant,

and

Local 638, United Brotherhood of Teamsters,
Intervenor,

v.

United Parcel Service, Inc.,
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-entitled matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on March 26, 2012, at the Office of Administrative Hearings in St. Paul, Minnesota. The record closed on May 21, 2012, upon receipt of post-hearing memoranda.

Jackson Evans, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, MN 55101-2127, appeared on behalf of the Commissioner of the Department of Labor and Industry (Complainant or Department). Timothy J. Louris and Roger A. Jensen, Miller O'Brien Cummins PLLP, One Financial Plaza, Suite 2400, 120 South Sixth Street, Minneapolis, MN 55402, appeared for Local 638, United Brotherhood of Teamsters (Intervenor). Carla J. Gunnin, Constangy, Brooks & Smith, LLP, 230 Peachtree Street NW, Suite 2400, Atlanta, GA 30303, appeared for United Parcel Service, Inc. (Respondent or UPS).

STATEMENT OF ISSUES

1. Did the Respondent violate an Occupational Safety and Health (OSH) rule, Minn. R. 5205.0110, subp. 3 (2011), which requires an employer to maintain a

minimum air temperature of 60 degrees Fahrenheit in indoor workrooms where work of a strenuous nature is performed?[1]

2. If so, what penalty is appropriate?

The Administrative Law Judge concludes the Respondent did not violate the rule in question.

Based upon the record and all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. United Parcel Service, Inc. (UPS) is a package delivery company. It has sorting facilities in Minneapolis and Maple Grove, Minnesota.

2. The sorting facility in Minneapolis is approximately 300,000 square feet; the Maple Grove facility is approximately 370,000 square feet.[2]

The Minneapolis Facility

3. In Minneapolis, inbound tractor trailers containing packages to be unloaded and sorted enter the building through three large bi-fold doors that are approximately 14 by 22 feet in size. One bi-fold door is located on the north side of the building, one is on the south side, and another is on the west side. In addition, there is a roll-up door on the west side that is manually operated to permit the exit of package trucks or vehicles from the automotive shop. The tractor trailers park at interior docks, where packages are unloaded, sorted, and moved around the facility on an extensive computer-controlled conveyor system.[3]

4. Packages that are intended for shipment to other sorting facilities are deposited near one of the 156 eight- by-eight foot dock doors that line the north, south, and east sides of the building. Other tractor trailers back up to these dock doors from the outside for the purpose of being loaded. Most of these dock doors remain open during the evening, night, and early morning hours in which the tractors are loaded.[4]

5. Packages that are intended for local delivery are deposited near "boxline" docks in the center of the building, where the package trucks are parked to be loaded.[5]

6. Approximately 130 to 140 package delivery trucks are parked in the building from about 4:30 p.m. each day, or whenever they return from their delivery routes, to about 8:30 a.m., when the trucks generally begin to leave the facility for deliveries. During the evening and nighttime hours, between 20 and 40 tractor trailers

[1] All citations to Minnesota Rules are to the 2011 edition.
[2] Testimony of Geurry Schuman at 222.
[3] Ex. A; Testimony of Ron Richardson at 18, 68-71, 78-79.
[4] *Id.*
[5] *Id.* at 78-79.

from out of state enter the building; packages in these tractor trailers are unloaded, sorted, and loaded back into outbound tractor trailers headed for other facilities or into package delivery trucks for local deliveries.[6]

7. About 200 to 300 employees work the midnight shift (11 p.m. to 3 a.m.) generally unloading the incoming tractor trailers and loading the outbound trailers. About 100 to 120 employees work the preload shift from 3 a.m. to 5 a.m., sorting packages to package cars for delivery. From 5 a.m. to about 8:30 a.m., 100 to 150 workers load the package cars for delivery.[7]

8. The Minneapolis facility also has a car wash and an automotive repair area in the operations area. About 20% (30 to 40) of the package trucks are washed each night. To be washed, the trucks leave the operations area through one of the bi-fold doors, and they are driven back inside through the wash tunnel to be parked for the rest of the night.[8]

9. Between about 9 a.m., when the package trucks have left, and 4:30 p.m., when they start to return for the evening, a lesser number of employees (about 30) do housekeeping and general maintenance work in the operations area.[9] There is less truck traffic in and out of the facility during these daytime hours than during the morning and evening.[10]

The Maple Grove Facility

10. The sorting facility in Maple Grove is newer and is organized somewhat differently. The building is a long rectangular shape, with 216 docks along the east and west sides for outbound tractor trailers. Inbound tractor trailers do not enter the building, but are backed up to a separate set of docks on the east side of the building. The interior of the building is divided into four quadrants, each of which has the capacity to park 67 or 68 package trucks. Offices and break rooms are located on the north and south ends of the building, as are the four large overhead doors through which the package trucks enter and exit. Conveyors run between and around these quadrants.[11]

11. The outbound dock doors remain open through the evening and night hours while loading is taking place. The foam seals around the dock doors are intended to keep the environment out. Air comes through around the bottom, between the metal floor and the trailer.[12]

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[6] Testimony of Ron Richardson at 22-35.
[7] *Id.* at 26-35.
[8] *Id.* at 58-59.
[9] *Id.* at 60-61.
[10] *Id.* at 33.
[11] Ex. B.
[12] Testimony of Eric Welle at 103-05.

12. The car wash and automotive areas are in separate buildings outside the operations area.[13]

13. About 570 employees work in the Maple Grove facility. In general, tractor trailers are unloaded during the evening hours. Packages are sorted and loaded into package trucks during the early morning hours. The package trucks leave the facility by 9 a.m. and return between 6 and 8:30 p.m. About 200 package trucks are parked inside the facility each night (50 in each quadrant). During daytime hours, employees perform general maintenance.[14] Again, there is less truck traffic in and out of the facility during daytime hours than during the morning and evening hours.

HVAC Systems

14. Both the Minneapolis and Maple Grove facilities have heating, ventilation, and air conditioning (HVAC) systems designed by Rapid Engineering.[15] These systems are designed to maintain slight positive pressure inside the buildings through pressure sensors that control how much air comes in from the outside. The positive pressure functions to distribute heat evenly around the facility and to prevent outdoor air from coming inside when doors are open.[16] When positive pressure is lost, cold air will enter the building through any opening, particularly if there is wind.[17]

15. The HVAC systems take in a set amount of outside air (typically about 20%), mix it with indoor air, heat it to a predetermined setting, and push the air back into the buildings.[18]

16. The HVAC systems also include particulate sensors that operate automatically to remove air that contains particulates such as carbon dioxide, carbon monoxide, and nitrogen dioxide, which are byproducts of the fuel burned by package delivery trucks and tractor trailers. The HVAC systems have the capacity to completely exchange all the air in the buildings every 20 minutes, or three building air changes per hour.[19] During such exchanges, 100% of the inside air is exhausted to the outside and is replaced with 100% fresh air brought into the building.[20]

17. These systems were designed to meet the ventilation standards required by ASHRAE standard 62, incorporated into the Minnesota Mechanical Code.[21]

18. The particulate sensors work independently of both the pressure sensors and temperature sensors and function to override settings for both pressure and

[13] Ex. B; Testimony of Eric Welle at 133.
[14] Testimony of Eric Welle at 88-98, 113-16.
[15] Testimony of James Radick at 250-55; stipulation as to manufacturer at 7-8.
[16] Testimony of James Radick at 250-55.
[17] *Id*. at 280-83.
[18] Testimony of Ron Richardson at 36.
[19] Testimony of James Radick at 247.
[20] Testimony of Ron Richardson at 53-54; Testimonoy of James Radick at 268-69.
[21] *Id*; *see also* Minn. Stat. § 326B.106, subd. 1 (2010); Minn. R. 1346.0050 (incorporating Chapters 2-15 of the 2006 International Mechanical Code).

temperature. The need to exchange air containing particulates takes priority over pressure and temperature settings. In Minneapolis, for example, there are 13 HVAC units in the operations area. Each unit operates independently; if a package truck or tractor trailer drives by a particular sensor it may trigger one or more units, depending on the amount of particulates sensed, to begin exhausting indoor air.[22]

19. In addition to the Rapid Engineering HVAC systems, the Minneapolis facility has large radiant heaters capable of a 100-degree temperature rise positioned above clerical work stations and in the automotive area, where workers are more stationary. These supplemental heaters can be turned on and off by the workers in those areas.[23]

20. Before the fall of 2009, thermostats in the operations area of the Minneapolis building were typically set at approximately 50 degrees Fahrenheit during the winter. This temperature setting was comfortable for employees who perform the labor-intensive work involved in loading, unloading, and sorting packages.[24] Office areas and break rooms adjacent to the operations area had separate thermostats that were set higher for people who did more sedentary work.[25]

21. In September 2009, UPS issued a policy intended to reduce costs and save energy. The policy required that thermostats in operations areas must be set at 45 degrees Fahrenheit in occupied areas during the winter heating season.[26]

22. Many employees in the operations areas in Minneapolis and Maple Grove found this temperature to be less comfortable. Some added layers of long underwear, sweatshirts, hats, and gloves to their usual working attire.[27] Loaders, unloaders, sorters, and clerks do not wear uniforms and are free to choose what they wear To Whom It May Concern: work.[28] There is no evidence, however, that the colder temperatures have affected any employee's health.[29]

The OSHA Citations

23. On December 10, 2009, an OSHA inspector went to the Maple Grove facility in response to a complaint that temperatures in the operations area were below freezing. A complaint about the adequacy of the ventilation system was added later. The inspector arrived shortly after the morning "rush hour," during which package trucks left the facility for the day. During the visit, the inspector observed the thermostat to be set at 45 degrees Fahrenheit.[30]

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[22] Testimony of James Radick at 268-71; Testimony of Ron Richardson at 37.
[23] Testimony of Ron Richardson at 39, 46.
[24] *Id.* at 47-49, 68; Testimony of Eric Welle at 107; Ex. 14.
[25] Testimony of Ron Richardson at 60-61.
[26] Ex. 9.
[27] Testimony of Ron Richardson at 43; Testimony of Eric Welle at 108-09.
[28] Testimony of Eric Welle at 128.
[29] *Id.* at 111.
[30] Ex. 14.

24. Air quality tests showed no detectable nitrogen dioxide, and carbon monoxide levels were well under permissible exposure limits. Temperatures in the operations area ranged from 48 to 55 degrees Fahrenheit.[31]

25. Outdoor temperatures near the Maple Grove facility that day ranged from a high of 7 degrees to a low of -7 degrees Fahrenheit.[32]

26. On December 24, 2009, an OSHA inspector went to the Minneapolis facility in response to similar employee complaints. Because it was such a busy time of year, all the managers were out doing deliveries. The inspector returned on December 28, 2009.[33]

27. The inspector conducted air quality tests showing no detectable amount of nitrogen dioxide. Carbon dioxide and carbon monoxide levels were well under permissible exposure limits. Temperatures taken in various parts of the operations area ranged from 54 to 62 degrees Fahrenheit.[34]

28. Outdoor temperatures near the Minneapolis facility that day ranged from a high of 25 to a low of 13 degrees Fahrenheit.[35]

29. During the closing conference, UPS managers contended the facility was a truck terminal or warehouse, not an indoor workroom. A citation was issued for failure to maintain temperatures at 60 degrees Fahrenheit in an indoor workroom, as required by Minn. R. 5205.0110, subp. 3.[36]

30. The Department initially characterized both citations as posing a serious hazard and proposed an adjusted penalty for each facility of $1,400.[37] Shortly before the hearing the Department amended the citation, characterizing it as a nonserious hazard with adjusted penalties of $700 for each facility.[38]

31. UPS disputes the merits of the citation, but it has not disputed the propriety of the revised penalty calculation assuming a violation is proved.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Labor and Industry and the Administrative Law

[31] Ex. 14.
[32] Ex. 17.
[33] Ex. 10.
[34] Ex. 10.
[35] Ex. 13.
[36] *Id.*
[37] Ex. 10; Ex. 14.
[38] Testimony of Carol McLean at 145; Testimony of Duncan Waweru at 188-89; Amended Notice and Order for Hearing (Feb. 14, 2012).

Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 182.661, subd. 3, 182.664 and 14.50 (2010).[39]

2. The Department gave proper notice of the hearing in this matter and has fulfilled all relevant procedural requirements of law or rule.

3. The Respondent is an employer as defined by Minn. Stat. § 182.651, subd. 7.

4. The Complainant has the burden of establishing an OSH violation by a preponderance of the evidence.[40]

5. Minn. Stat. § 182.653, subd. 3, requires each employer to comply with Occupational Safety and Health Standards or Rules adopted pursuant to Chapter 182.

6. Minn. R. 5205.0110, subp. 3, provides as follows:

5205.0110 INDOOR WORKROOM VENTILATION AND TEMPERATURE.

Subp. 1. **Air.** Air shall be provided and distributed in all indoor workrooms as required in this code, unless prohibited by process requirements.

Outside air shall be provided to all indoor workrooms at the rate of 15 cubic feet per minute per person.

Air circulated in any indoor workroom shall be supplied through air inlets arranged, located, and equipped so that the workers shall not be subjected to air velocities exceeding 200 feet per minute except under special circumstances specified in this code or where approved by the Department of Labor and Industry.

. . .

Subp. 3. **Minimum air temperature.** Indoor workroom temperatures shall be maintained as follows:

A. The minimum air temperature of 60 degrees Fahrenheit shall be maintained in all indoor workrooms where work of a strenuous nature is performed, unless prohibited by process requirements.

B. The minimum air temperature of 65 degrees Fahrenheit shall be maintained in all other indoor workrooms unless prohibited by process requirements.

[39] All citations to Minnesota Statutes are to the 2010 edition.
[40] Minn. R. 1400.7300, subp. 5.

7. Minn. R. 5205.0200 provides as follows:

5205.0200 GARAGE VENTILATION.

Subp. 1. **Scope.** Ventilation shall be provided for all repair garages, service stations, body shops, and all live storage garages, housing six or more vehicles driven by internal combustion engines. A live storage area is any area within a building used for the storage of fire trucks, tractors, automobiles, trucks, and other self-propelled vehicles driven in and out under their own power.

Subp. 2. **Size of general ventilation system**. The ventilation system shall be capable of removing a volume of air not less than three-fourths cubic foot per minute per square foot of floor area in garages and not less than one-half cubic foot per minute per square foot of floor area in service stations. Exhaust ducts shall not be more than 18 inches from the floor, so placed as to remove carbon monoxide gas from the entire garage. An equal amount of tempered fresh supply air shall be provided.

8. The operations areas of the UPS facilities in Minneapolis and Maple Grove are not "indoor workrooms" subject to the minimum temperature requirement in Minn. R. 5205.0110. They are subject instead to the garage ventilation standard in Minn. R. 5205.0200, which contains no minimum temperature requirement.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that: the citations are REVERSED.

Dated: June 20, 2012

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

Transcript prepared (Kirby A. Kennedy and Associates).

NOTICE

Notice is hereby given that under Minn. Stat. § 182.664, subds. 3 and 5 (2010), this decision may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee, their authorized representatives, or any

party, within 30 days following the service by mail of this decision. The procedures for appeal are set out at Minn. Rule Ch. 5215.

MEMORANDUM

There are no federal OSHA temperature standards. The Department has adopted one standard for indoor workroom ventilation and temperature, Minn. R. 5205.0110; this standard requires that fresh air be taken into indoor workrooms at a particular rate, and it requires that minimum temperatures be maintained. The Department has another standard for garage ventilation, Minn. R. 5205.0200; this standard is applicable to repair garages, service stations, body shops, and live storage areas housing six or more vehicles driven by internal combustion engines. A live storage area is any area within a building used for the storage of vehicles that are driven in and out under their own power. The garage standard requires not only that tempered fresh air be taken into a garage, but that the ventilation system must be capable of *removing* air at a specified rate. The garage standard does not contain a minimum temperature requirement. It is apparently intended to work in concert with Minn. R. 5205.0116, which requires an employer to monitor environmental exposure to carbon monoxide whenever internal combustion engine powered industrial trucks are operated indoors and to ensure that carbon monoxide and other particulate levels do not exceed those specified in federal regulations.[41]

It is apparent that the indoor workroom standard and the garage standard are not intended to apply to the same spaces. The ventilation requirements are different in the two rules, and there is no minimum temperature requirement in the garage rule. It goes too far to say, as does the Department, that any building with walls, doors, and a roof, in which employees work, is an "indoor" workroom. The garage rule clearly applies to areas *within a building* when the building is used for the storage of vehicles that are driven in and out under their own power. An employer using a portion of a building to store vehicles that are driven in and out under their own power could not comply with OSHA standards by treating the space simply as an indoor workroom. The Department's argument fails to account for the language of both rules and the need to examine how the space is actually used in order to determine how it must be heated and ventilated. And contrary to the Department's argument, the "tempered" fresh air referenced in the garage rule does not require that the fresh air must be "heated" to any specific temperature.

The Department's witnesses were simply unconvincing in their testimony regarding the applicability of these standards. In response to a question about the applicability of the garage ventilation standard to these facilities, one Department witness testified that she thought the garage ventilation rule only applied to a repair garage, and UPS did not operate a repair garage.[42] Another Department witness appeared to testify that because there were no package trucks parked there at the time of his inspection, he could not speculate as to whether the garage standard might apply.

[41] *See, e.g.*, 29 C.F.R. § 1910.1000(a) Table Z-1-A.
[42] Testimony of Carol McLean at 173.

When repeatedly asked whether the standard would change if vehicles were parked there at night and on weekends, he did not answer the question but responded somewhat evasively that if no people were present, there might not be any OSHA regulation that applied because there would be no employee exposure.[43]

The garage ventilation standard, by its own terms, clearly applies to buildings other than repair garages. And because the ventilation requirements are different for indoor workrooms than for garages, it cannot be the case that the garage standard might apply only when vehicles are actually parked there. Most employees are present in the building during the evening, night, and early morning hours, when hundreds of trucks are parked in these facilities. It makes no sense that the OSHA standard applicable to this space would change when the trucks and most of the employees leave for the day.

The Department maintains that it has consistently taken the position that buildings such as these are indoor workrooms subject to the rule. In the past it has issued citations to a supplier of wooden pallets with a 40,000 sq. ft. facility, having one large overhead door that opened to permit ingress and egress of forklifts;[44] a brick manufacturer that conducted "tumbler" operations in a shed that was heated only by space and floor heaters;[45] a manufacturer of custom molded rubber products that failed to adequately heat various interior portions of its 14,000 sq. ft. facility;[46] a manufacturer of rodeo equipment that used electric space heaters to heat areas where employees used sewing machines, because the heating system had been shut off;[47] a manufacturer of corn flour and tortilla products that failed to adequately heat a room used to mix and store minor ingredients;[48] a flooring manufacturer that failed to adequately heat a saw room;[49] and a recycling facility that had no heat in the areas where sorting took place, and where overhead doors were kept open to accommodate "forklifts running indoors and outdoors" as trucks arrived to deliver material.[50] None of these citations involves a situation similar to this one, in which hundreds of package trucks and tractor trailers driven by internal combustion engines enter and exit the facilities on a regular basis each day and park there overnight and on weekends. Moreover, one Department witness acknowledged that she had inspected a completely unheated truck terminal that was not cited for violation of the indoor workroom rule.[51]

If the indoor workroom rule did apply, the Respondent has argued that maintenance of the temperature at 60 degrees Fahrenheit is either "prohibited by process requirements" or is technologically infeasible. UPS contends that its processes

[43] Testimony of Duncan Wuwaru at 194-96.
[44] Ex.8 (OSHI ID Y7000, recorded temperatures were between 31 and 35 degrees F).
[45] Ex. 8 (OSHI ID S8945, recorded temperatures averaged 35 F).
[46] Ex. 8 (OSHI ID Q5731, recorded temperatures between 41 and 55 degrees F).
[47] Ex. 8 (OSHI ID I5467, recorded temperatures between 47 and 56 degrees F).
[48] Ex. 8 (OSHI ID X6353, recorded temperatures between 52 to 53 degrees F, where the use and storage of raw ingredients did not require special temperatures).
[49] Ex. 8 (OSHI ID S0970, recorded temperatures of 40 degrees F).
[50] Ex. 8 (OSHI ID Q5731, recorded temperatures of 40 degrees F).
[51] Testimony of Carol McLean at 165-66.

require the loading and unloading of tractor trailers through hundreds of dock doors that leak air and the driving in and out of trucks through multiple bi-fold or overhead doors and that it is impossible to maintain a constant temperature of 60 degrees Fahrenheit in this environment.

UPS has shown that because of all the open doors and docks, it is difficult to maintain a uniform temperature in all parts of the operations area. Even when the thermostat was set at 45 degrees Fahrenheit in Maple Grove, for example, temperatures in the operations area varied from 48 to 55 degrees. Temperatures in Minneapolis ranged from 54 to 62 degrees Fahrenheit. Respondent has not shown, however, that its systems could not maintain a minimum temperature. What the HVAC engineer said was that no system could maintain a constant interior temperature when dock doors are open and large overhead doors are repetitively opened for vehicles to enter and exit, as occurs in UPS facilities.[52] It is conceivable that if the temperature were set high enough inside the facility, a minimum temperature of 60 F could be maintained. But because of ventilation requirements to remove indoor air that is contaminated by particulates, maintenance of this temperature would require UPS effectively to heat the outdoors during those parts of the day when tractors and package trucks are going in and out.

UPS certainly has an obligation to ensure that its employees are working in an environment that does not expose them to injury from cold. UPS may meet that obligation by keeping the heat set at safe levels or by providing employees with personal protective equipment that is adequate to prevent hypothermia or frostbite. On this record, however, the ALJ cannot conclude that UPS was required to maintain a temperature of 60 degrees Fahrenheit in the operations areas of its Minneapolis and Maple Grove sorting facilities.

K.D.S.

[52] Testimony of James Radick at 262-63.